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Board of Commissioners of Tooele v. Ferrebee : Reply Brief

Utah Supreme Court

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BRIEF

IN THE SUPREME COURT OF UTAH

BOARD OF COUNTY COMMISSIONERS OF TOOELE COUNTY, Plaintiff and Appellant, vs. JOSEPH WILEY FERREBEE, TRUSTEE OF THE FERREBEE 1976 FAMILY TRUST, Defendant and Appellee.	No. 900373
BOARD OF COUNTY COMMISSIONERS OF TOOELE COUNTY, Plaintiff and Appellee, vs. JOSEPH WILEY FERREBEE, TRUSTEE OF THE FERREBEE 1976 FAMILY TRUST, Defendant and Appellant.	No. 900398 Priority 16

REPLY MEMORANDUM

On Appeal from the Judgment of the Third District Court
In and For Salt Lake County
Honorable Homer F. Wilkinson

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASE CITATIONS **PAGE**

STATUTES

I.
LEGAL ARGUMENT

A. FERREBEE IS NOT ENTITLED TO AN AWARD OF ENHANCEMENT VALUE FOR PROXIMITY TO THE AIRPORT

The lower court erred in awarding an enhancement value to Ferrebee because of the proximity of his property to the Airport. The lower Court awarded Ferrebee an enhancement value which more that doubled the value of his property. R. 410. The lower court's erroneous conclusion to make such an award is reviewed on a correction of error or de novo standard because contrary to the claims of Ferrebee the question of the award of an enhancement is a question of law. United States v. Reynolds, 397 U.S. 14, 19-21 n.14 (1970).

A property owner cannot claim enhancement value for property taken in a second, completely separate, condemnation action where the property was "probably within the scope of the project . . ."(emphasis added). United States v. Miller, 317 U.S. 369, 377 (1942).

> If a landowner's property increases in value because of the government project, the government need not pay this enhancement value unless (1) the property was not within the original scope of the project; or (2) the government failed to provide the public with adequate notice of the project scope, see United States v. 2353.28 Acres of Land, 414 F.2d 965 (5th Circ. 1969); or (3) the landowner reasonably believed that subsequent government action removed the property from the project scope (citations omitted).

United States v. 49.01 Acres of Land, 669 F.2d 1364, 1367 (10th Circ. 1982). Ferrebee makes no claim that the government failed to provide him notice of the project scope because it was

sufficient for the government to put him on notice by publicly disclosing its plans which indicated a contemplated use of his property in the project. Id. at 1368. As to Ferrebee's remaining arguments, that his property was not within the original scope of the plan or that it had been removed by subsequent action, the courts have always placed a "heavy burden" on landowners to prove such claims. Id. In this instance there is absolutely no evidence to support Ferrebee's arguments and the lower court made specific findings of fact contrary to his assertions.

Ferrebee wrongly and confusingly argues that his property was "not contemplated" in the original planning. See Appeal Brief p. 21.[1] The lower court made a specific finding of fact that, "The county's original airport layout plan for the airport included approximately sixty-eight (68) acres of Ferrebee's eighty (80) acre parcel. Approximately twelve (12) of the Ferrebee acres were not included in the county's original plan. . . . . On May 16, 1986, after the initial construction of the airport, the County filed this action to condemn the remaining forty-three (43) acres of the Ferrebee property (the "Subject

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[1] Ferrebee tries to imply that because the initial construction of the Airport was only a partial construction of the full plan that the rest of the Airport development was an expansion project un-anticipated by the original plan. See appeal Brief, p. 21. Ferrebee cites nothing from the record that would support this implication. In fact the record indicates that at all times relevant to the development of the Airport all of Ferrebee's property was targeted for taking. R. 435, at 26, 34, 35, 62, 67, 148, 158, 160, 202, 207-208, 238.

Property")." R. 412. The record is uniform and replete with reference to the fact that from the very inception of the idea for the airport all 80 acres of the parcel owned by Ferrebee were designated for acquisition. R. 435, at 26, 34, 35, 62, 67, 148, 158, 160, 202, 207-208, 238.[2]

The lower court's finding accurately reflects the fact that 68 acres of the Ferrebee property were included within the boundary set for the construction of the airport as originally planned. The record also makes it clear that the remaining 12 acres, not included within the actual construction of the Airport was an uneconomic remainder in the form of a strip of land 100 feet wide by approximately a mile and a half long which the county understood would have to be acquired because it was landlocked and could not be put to any real use by the owner. Id. Through its various developmental phases and modifications at no point did the county determine to take less than the full acreage owned by Ferrebee. There is no evidence in the record, and Ferrebee cites none, that the scope of the original project was "abandoned."

Ferrebee tries to imply that because only part of his property was taken in the first condemnation proceeding in 1976 that this "clearly expressed an alteration" from the original

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[2] While Ferrebee argues that "During the course of planning and construction of the airport under the original plan the acquisition of additional land was not contemplated", he cites nothing from the record to support this allegation. See Appeal Brief, p. 21.

plan as to create a reasonable expectation that his property had been removed from the project scope. United States v. 49.01 Acres of Land, supra, at 1376. This implication is neither support by the facts of this case or the law.[3] The record reflects that the Ferrebee property was always designated for acquisition. Furthermore, the record indicates that only part of Ferrebee's property was taken in the first condemnation action because the County did not have the money to purchase all of his property the first time around. R. 435, at 123. The County's inability to acquire all of Ferrebee's land in the first proceeding does not, as a matter of law, establish a removal of the property from the original project or give Ferrebee a reasonable belief that his property had been removed from the scope of the project.[4] For example, in the United States v. 65.0 Acres of Land, 728 F.2d 417 (10th Circ., 1984), the court addressed the issue of the government's acquisition of an "uneconomic remainder" which was not condemned in the first

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[3] Ferrebee cites no reference to the recorded to either establish or justify his now claimed expectation that his property was not designated to be taken by the County. Furthermore, there was never any evidence illicite at trial which would substantiate a claim that the County had abandoned its intention to acquire Ferrebee's property.

[4] It is important to note that Ferrebee never testified that he thought that his property had been removed from the scope of the project, nor that he ever believed , at any point, that the County did not want all his land for the Airport project. Furthermore, Ferrebee cites nothing from the record to support a contention that he did not expect the County to acquire the remainder of his property by condemnation, or other wise, after the first condemnation action was begun.

condemnation proceeding because of insufficient funds. The court held that

> One of the basic premises underlying Miller and its progeny is that the government should not, could not, be expected to condemn all of the land needed for a particular project at the same time. The testimony at trial was that the government did not condemn the 32.5 acres when it condemned the 515 acres because of insufficient funds. As a matter of law, such actions in and of themselves do not remove land from the scope of the project.

Id. at 420.

From the unequivocal findings of the lower Court at least 32 of the acres involved in this condemnation action were within the scope of the Airport project from the beginning.[5] Furthermore, the record also supports the fact that the remaining 12 acres was an uneconomic remainder which the County recognized that it would have to acquire as part of its development of the Airport.[6]

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[5] Ferrebee's statement that "Acquisition of the subject property in the second condemnation was thus not within the scope of the original project, nor was it within Ferrebee's reasonable expectations" Appeal Brief, p. 23, is a blatant mis-statement of the facts of this case and the findings of the lower court.

[6] Ferrebee's counsel proposed in the initial proposed Findings of Fact and Conclusions of Law submitted to the lower court paragraphs which tried to cast the County's taking of his property as two separate takings unrelated to an overall plan for development of the Airport. These proposed findings were objected to by the County on the basis that all Ferrebee's land was projected for taking from the inception of the Airport plan and that nothing changed or varied that fact. R. 335, 369. The lower court's finding that the 1976 condemnation action is unrelated to the 1986 action is not, as Ferrebee tries to imply a finding that the property condemned in 1986 was not within the scope of the original project. The lower court made as its first finding of fact that Ferrebee's property was identified for taking from the beginning. R. 409.

Because the Ferrebee property was always contemplated for acquisition, no award for enhancement of his property for its proximity to the Airport can be awarded as a matter of law. The lower court clearly erred in making such an award.

B. THE TRIAL COURT ABUSED ITS DISCRETION IN ADOPTING FERREBEE'S APPRAISAL AS THE BEST ESTIMATE OF HIS PROPERTY'S FAIR MARKET VALUE

Not only is Ferrebee's appraisers' appraisal defective as a matter of law because he provides an enhancement value for Ferrebee's property's because of its projected used in conjunction with the Airport, the lower court abused it's discretion in accepting Ferrebee's appraisal as the best estimate of the fair market value because it failed to prove the property's alleged higher and better use and in failing to strike portions of his appraisal because it was based on incompetent and inadmissable evidence.

1. FERREBEE DID NOT CARRY HIS BURDEN OF PROOF AS TO A HIGHER AND BETTER USE

From the record, it is clear that Ferrebee's property is and has always been used for agricultural purpose. The County appraisers value the property based on its agricultural use, and Ferrebee's appraisers contended that it had a higher and better use, in conjunction with the Airport. Ferrebee has the burden of proof to establish a claimed higher and better use which he failed to do.

In State v. Jacobs, 397 P.2d 463, 464 (Utah 1964), the Utah Supreme Court stated that "the owner of property under a

condemnation is entitled to a value based upon the highest and best use to which it could be put at the time of the taking, without limitation as to the use then actually made of it. However, the projected use affecting a value, must be not only possible, but reasonably probable. It must not be merely in the realm of speculation because the land is adaptable to a particular use in the remote and uncertain future." As was demonstrated in the County's opening brief Ferrebee failed to establish the three elements of feasibility to support his claim of a higher and better use.[7]

Because Ferrebee's property was always anticipated as being included within the final development of the airport, analysis of its higher and better use can not be premised on the idea that it would be used in conjunction with the airport. Even assuming that future airport use, e.g., commercial or industrial development, could be taken into consideration, Ferrebee had to demonstrate that the three elements of feasibility existed for that higher and better use. In this instance, the elements that

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[7] Ferrebee contends that the three elements of feasibility referenced in the County's brief are merely academic dialogue and not based in relevant law. The three part test is clearly a part referred to by the County has firm footing in case law derived from this and other jurisdictions. See, Brinkerhoff, Eminent Domain: Proving Highest and Best Use of Undeveloped Land in Utah, 1973 Utah L. Rev., 705 (1973)(and the cases cited therein); Moyle v. Salt Lake City, 176 P.2d 582 (Utah 1947); State v. Jacobs, 397 P.2d 463 (Utah 1964). Furthermore, that three part test is the very backbone of the analysis of Mr. Ferrebee's appraiser. He cites the three factors in is appraisal as those which must be met to establish the property's highest and best use. R. 434, at 11 Exhibits 91 and 92.

are most notably lacking are those relating to legal and economic feasibility.

It is well recognized that the landowner carries the burden of establishing that there is a reasonable likelihood that zoning will be changed to permit the proposed higher and better use. State v. Jacobs, supra. It is also understood and accepted that proving "the existence of a reasonable probability by means of expert opinion has been held to be impermissible, since this involves prognostication of future legislative action." 7 Nichols Law of Eminent Domain, Sec. 12C.03[3]. Furthermore, the clear evidence before the court as provided by the County Director of Development established that where the Ferrebee property was to ultimately be incorporated within the actual physical development of the airport, the likelihood or probability of a zoning change was zero. Where the county zoning ordinances precluded the higher and better use proposed by Ferrebee, the court could not consideration the proposed higher and better use unless the legal feasibility was established. The record is devoid of any evidence to support Ferrebee's contention that the zoning would have been change to permit his proposed use.

As to the economic feasibility of the proposed higher and better use, Ferrebee contends that the focus is only on the reasonable probability of the use. Appellate Brief at 26. Important in the consideration of the reasonableness of the

probability of the proposed higher and better use is the use "must not be merely in the realm of speculation because the land is adaptable to a particular use in the remote and uncertain future." State v. Jacobs, supra, at 464. All of the evidence that is represented by Ferrebee to substantiate a reasonable probability of his proposed use relate are his appraiser's review of aviation studies that were thoroughly and completely rejected by the county. Furthermore, at the time of the condemnation action, there was absolutely no viable market for the use proposed by Mr. Ferrebee. R. 435, at 155, 305-6; R. 434, at 127. State v. Hopkins, 29 Utah 2d 131, 506 P. 2d 57 (1973), State vs. Tedesco, 4 Utah 2d 248, 291 P. 2d 1028 (1956). The fact that there was no viable market for his proposed use was in fact recognized by Ferrebee's appraisers. R. 439, at 795, Exhibit 21, p.6; R. 434, at 128. Specifically, Mr. Cook conceded that there was no demand for commercial development in or near the airport and that his conclusions as to future possible uses were merely "forward thinking". R. 434, at 11, Exhibit 91, p. 28. Ferrebee has failed to carry his burden of proof as to the higher and better use upon which he bases his appraisal.

2. **THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING THE COOK APPRAISAL BECAUSE IT IS BASED ON INCOMPETENT AND INADMISSABLE EVIDENCE.**

Ferrebee attempts to avoid the county's arguments concerning the improper basis for his expert's appraisal by contending that the inadmissible and hearsay evidence used in his appraisal was

not intended to be direct substantive evidence of the property's value but instead merely supports and corroborates the opinion of the expert. This argument misses the point. The lower court admitted into evidence Phil Cook's appraisal and then accepted the appraisal as the basis for its findings as to fair market value.[8] R. 411. First, it must be understood that the approach taken by Ferrebee's appraiser was to provide a comparable sale valuation. The very heart of such an appraisal is the selection of property which is "reasonably comparable". "The requirement is that a [comparable sale] meet the test of `reasonable comparability.' That is, that these factors exist in sufficient similarity that the sale can fairly be regarded as having some probative value in arriving at a proper appraisal of the property", Redevelopment Agency of Salt Lake v. Mitsui, Inc. 522 P.2d 1370, 1373 (Utah 1979).

> It must be remembered, however, that the comparison is made with lands which are similar to the land taken. Of course, only such parcels may be compared where the dissimilarities are reduced to a minimum and allowances made for such dissimilarities. It is, therefore, imperative to consider such differences as may exist in a physical and environmental condition and in proper allowance made to cover any differential that may exist by virtue of the difference in the time of the sale. It is evident that there may be considerable difference in the size, shape, situation, and immediate surroundings of two estates, and perhaps in other respects, an enterprise in which one bought may be a

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[8] The lower court's Findings of Fact and Conclusions of Law read: "The appraisal of Phil Cook, Ferrebee's appraiser, is the best estimate of the fair market value of the Subject Property, and it is adopted by the Court as the true market value of the Subject Property." R. 411.

substantial assistance in determining the value of the other. 5 Nichols, Law of Eminent Domain, Sec. 21.3 [1], page 231 (Emphasis in original). Thus, the critical inquiry that must be made is whether the property is truly comparable. In this instance, evidence concerning an enhancement value to the property was provided in the Phil Cook's appraisal which was premised on inadmissable hearsay opinions which could not be examined and whose reliability could not be attested to.

The process that Mr. Cook used to arrive at his "enhancement value" was to contact individuals, whose credentials and experience in valuing property was unknown, and inquired concerning sales of property located near rural airports. R. 434, at 167-8. To establish that the sales included a particular value for proximity to an airport he then inquired as to that individual's opinion as to what similar property not adjacent to their airport sold for. R. 434, at 167-8. Once that opinion was solicited, the difference between that property and the sale neighboring the airport was calculated, and became the basis for enhancement value to be applied to Ferrebee's property. R. 434, Exhibit 91, pp. 42-43.

While Rule 703 of the Utah Rules of Evidence allows an expert to testify from hearsay "facts and data", it does not, and should not, permit an appraiser to shield the essential questions of comparability behind the opinion of another. In this instance, the comparability of the properties used to establish the enhancement factor was based on another's analysis. The

reliability and credibility of that essential analysis was beyond the scope of cross examination and beyond the investigation of the court. Warren v. Waterville Urban Renewal Authority, 235 A.2d 295, cert. denied, 390 U.S. 1006. The lower court abused its discretion in permitting into evidence Cook's appraisal without striking the inadmissable hearsay evidence.

Furthermore, much of the information provided as to actual sales near other rural airports involved amounts that were paid under the threat of condemnation or as a final award in a condemnation action. It is recognized that amounts paid through condemnation are not an appropriate basis for the calculation of fair market value. Such information should not be admitted for the purpose of determining value. See cases cited in County's opening brief page 32.[9]

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[9] Honolulu Redevelopment Agency v. Pun Gun, 426 P.2d 324, (Hawaii 1967) cited by Ferrebee in support of his contention that awards in condemnation may be admitted in evidence to demonstrate value under a comparable sales approach does not go as far as Ferrebee claims. "The better view is that such evidence should not be automatically underlined excluded as a matter of law. If it can be shown to the satisfaction of the trial court that the price paid was sufficiently voluntary to be a reasonable index of value or that there is a necessity for the evidence because the only sales of comparable property in the area in recent years have been to the condemnor, such evidence should be admitted." Id., at 325. This position appears to be a minority view. Furthermore, Ferrebee did not demonstrate that the prices paid in those condemnation actions were sufficiently voluntary to be either reliable or competent.

C. THE LOWER COURT PROPERLY LIMITED FERREBEE'S RECOVERY BECAUSE HIS PROPERTY WAS LANDLOCKED

Ironically, Ferrebee challenges the lower court's calculation of the reduction in value of his property for lack of access. Ferrebee contests the court's calculation of the lack of access based on what Ferrebee contends is an inadmissable option agreement. Ferrebee's claim is ironic because the option agreement referred to by the lower court in its Findings of Fact was concocted by his own attorneys to enhance the value of his property in preparation for this litigation. R. 439, at 658-66. The creation of the option is also ironic because Ferrebee had to state a value for the property to be acquired for access which would approximate the amount that he was demanding for his property in order to justly his demands. When that option was then presented to demonstrate that access was available for the property, the lower court felt compelled to accept that option, not as an assessment of the property's fair market value, but as the actual cost of access which had been negotiate by Ferrebee. Besides the irony created by Ferrebee's argument, his claims are without force because he did not object to the introduction in evidence of the option at the time of trial, and did not raise the issue of the inadmissability of the option when the lower court made its Findings of Fact and Conclusions of Law. Finally, contrary to Ferrebee's argument the option was not admitted as evidence of fair market value of Ferrebee's property but was introduced to demonstrate what Ferrebee had negotiated to provide

access to his property. In any event, regardless of the admissability of the option, Ferrebee's own appraiser, Phil Cook, who was relied upon by the lower court to establish fair market value, for the property, stated that the Ferrebee property was subject to a deduction in the same amount as the option because it was land locked. R. 411, 434, at 11, Exhibits 91 and 92, pp 40-42. Mr. Cook arrived at that same deduction based on considerations which were independent from the option.[10]

At the time the documents reflecting the option for access were offered in evidence, and the testimony relating to that option was accepted by the court, Ferrebee's counsel did not object to the admissibility of that evidence.[11] In addition, at the end of the trial the lower court requested that Ferrebee's counsel prepare proposed Findings of Fact and Conclusions of Law in keeping with the lower court's Bench Ruling. Several drafts of Findings of Fact and Conclusions of Law were prepared by Ferrebee's counsel, objections to the Findings of Fact and Conclusions of Law were submitted by the County and argued before the lower court. At no time did Ferrebee's counsel ever object

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[10] Both of the appraisers provided by the County determined that the Ferrebee property was landlocked and an appropriate deduction was made. It is important to note that the County's appraisers and Ferrebee's appraiser, Phil Cook, agreed that the appropriate deduction was $19,400. R. 439, at 554, Exhibit 17; R. 437, at 370, Exhibit 11; R. R. 434, at 11, Exhibits 91 and 92.

[11] The County in a pre-trial Motion in Limine moved to have evidence of the option excluded from evidence. Ferrebee actively objected to the County's Motion, and the lower court declined to excluded the evidence. R. 177 and 196.

to the court's use of to the option on the basis that it was inadmissable or for any other reason, and the final Findings of Fact and Conclusions of Law, as prepared by Ferrebee's counsel, was signed by the court incorporating the lower court's use of the option. R. 334, 367A, 398, 403, 416, 418, Ferrebee never raised the with the lower court the issue that it is now raising on appeal. "[I]n order to preserve a plea of error, the alleged error must have been raised seasonably by counsel to the trial court. The purpose of this rule is to allow the trial court to correct any error, if error there be." Utah County v. Brown, 672 P.2d 83, 85 (Utah 1983), Ringwood v. Foreign Auto Works, Inc., 786 P.2d 1350 (Utah App. 1990), Mascaro v. Davis, 741 P.2d 938 (Utah 1987). By not raising this issue with the lower court Ferrebee has waived his right to raise it now. Utah County v. Brown, supra.

Regardless of the admissibility of the option in determining the final fair market value of the property (it should be noted, however, that the option was not admitted for the purpose of determining fair market value, but for the purpose of establishing access to the property negotiated and provided by Ferrebee) Ferrebee's own appraiser, disregarded Ferrebee's option for access and using other comparables arrived at a deduction because the property was landlocked. The deduction was almost exactly the same value as the option price. Ferrebee's appraiser, Phil Cook, determined that it was appropriate to

reduce the base agricultural value of the property by $19,400 because the property was landlocked. In his testimony to the court, and in his appraisal, he indicated that he examined the impact of the property being landlocked from several different perspectives, including the negotiated access at $5,000 per acre and concluded: "there are inherent risks associated with purchasing landlocked property. A prudent investor would discount the price to reflect these risks. The discount in this case would likely range from a nominal amount to 37%." R. 434, at 11 Exhibits 91 and 92, pp 40-42. Mr. Cook went on to state that: "In this case, there is as much evidence to suggest a nominal discount as to suggest a large discount of 37%. Nevertheless, a prudent investor would be conservative in concluding this cost. A full 37% discount is applied." R. at 11, Exhibit 92, p. 43.

The lower court relied on Ferrebee's evidence of his own dealing to provided access to his otherwise landlocked property in determining what deductions were appropriate. The access provided by way of option would cost the County $19,400. Ferrebee's own appraiser concluded that the fair market value of the property necessitated a discount because it was landlocked, based on his independent assessment, of an amount which was comparable to the option. Thus, regardless of how the amount was arrived at, it was appropriate that the property be discounted because it was landlocked.

D. FERREBEE IS NOT ENTITLED TO AN AWARD OF ATTORNEYS FEES

Utah law permits an award of attorneys fees under only two conditions-- where they are provided for by contract or statute.[12] Cady v. Johnson, 671 P.2d 149, 151 (Utah 1983). Ferrebee sought an award of attorneys fees in the lower court under Utah Code Annotated §78-27-56 for bad faith conduct of the County in its initiating this condemnation action. The lower court in its Bench Ruling rejected Ferrebee's request stating, "I am denying them under that section because I think that the county's actions as far as the straight condemnation case were not that bad." R. 431, at 6. No attorney's fees were awarded by the lower court.

The lower court as part of its Bench Ruling held that with regard to claims made by Ferrebee under the Utah Relocation Assistance Act, Utah Code §57-12-1, et seq, and the Uniform Relocation Assistance and Land Acquisition Policies Act of 1970, 42 U.S.C. §4601, et seq, (hereafter referred to as the State and Federal Relocation Assistance Acts), those acts did not apply in this case.[13] The Court went on to commented that "The Court is

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[12] Attorneys fees are "non-compensable as 'just compensation'" in condemnation actions; "compensation for such costs . . . in a condemnation action is a matter of legislative prerogative and must be provided by statute." Redevelopment Agency v. Daskalas, 785 P.2d 112, 1123 (Utah App. 1989)(citations and footnotes omitted).

[13] The lower court held in its Conclusions of Law that "the Utah Relocation Assistance Act, Utah Code §57-12-1, et seq. does not apply to this case" and that "the Uniform Relocation Assistance and Land Acquisition Policies Act of 1970, 42 U.S.C. §4601, et seq., does not apply to this case." R. 409-10. The Relocation Assistance Acts are meant to apply only where a person is "displaced", from his property by the act of the condemnation,

of the opinion that if the State and Federal Relocation Act did apply, that attorney fees may be applicable. But based on the otherwise, I would not award attorney fees in this case." R. 431, at 3, 5. When pressed further as to whether the court would award attorneys fees if the State and Federal Relocation Acts applied, the court stated, "Well, I'll indicate to you that I would be inclined to award attorneys fees. But, I hesitate to say that, and I am not ruling that way because of the fact that I don't want this to be an appeal just to get some attorneys fees. So I'm not saying that I will definitively do it, but I am saying that that is the way I was looking at it." R. 431, at 6. Apparently tantalized by the lower courts observations Ferrebee has now proceeded to do exactly as the lower court feared, he filed this appeal for the purpose of seeking attorney's fees.

The review of a trial court's decision to refuse an award of attorneys fees is reviewable on an abuse of discretion standard. Canyon Country Stores v. Bracey, 781 P.2d 414, 421 (Utah 1989). The trial court did not abuse its discretion in denying attorney's fees in this instance.

First it should be noted that the State and Federal Relocation Assistance Acts do not create an independent basis for

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i.e., the land owner is removed from his place of residence or business. In this instance, Ferrebee's property was raw land on which he neither carried on a business or had a place of residence, thus he was not displaced within the meaning of the act. Where the Acts did not apply to this condemnation action, the procedural safeguard of the act are neither applicable to nor binding on the county.

an award of attorneys fees. See, Utah Code §57-12-1, et seq, and 42 U.S.C. §4601, et seq. Even if those Acts applied to the facts of this case, which the lower court found that they do not, R. 431, at 2, they do not permit the court to award attorneys fees. See, Cady v. Johnson, supra.

Ferrebee tries to boot-strap the lower courts findings that even though the State and Federal Relocation Assistance Acts do not apply that the County did not follow their procedures to create the implication that the County acted in bad faith in bring this action. The lower court refused to make the very finding that Ferrebee is trying to establish by implication, and there is certainly nothing in the record which indicates that the lower court abused its discretion in so ruling.

An award of attorneys fees under §78-27-56 requires the finding of "two elements . . . first, the claim must be without merit", and the "plaintiff's conduct in bringing suit was lacking in good faith." Cady v. Johnson, supra, at 151. Neither of these elements are found in this case, and the specific findings of the court support its determination that none should be awarded.

"Without merit" is defined by the Utah court as "bordering on frivolity" or "of little weight or importance having no basis of law or fact." Cady v. Johnson, supra. There is nothing in the record that would indicate that the County's suit for condemnation was frivolous or has no basis in law and fact.

Apparently, Ferrebee does not even contend that such is the case. Rather, Ferrebee completely ignores this element of the test and focuses solely on the second requirement that the suit be lacking in good faith.

Lacking in good faith is defined as

> (1) an honest belief in the propriety of the activities in question; (2) no intent to take unconscionable advantage of others; and (3) no intent to, or knowledge of the fact that the activities in question will hinder, delay or defraud others.

Cady v. Johnson, supra., at 151.

Ferrebee contends that the acts of the county leading up to the condemnation actions were "reprehensible and flagrantly abusive". Appeal Brief, at 44. In particular, Ferrebee points to an alleged lack of honesty on the part of the County in offering $275 per acre for Ferrebee's property when the County had prior appraisals for $4,500 an acre and $1,750 an acre. The history of the negotiations with Ferrebee were clearly and fully laid out in the County's original Appellate Brief. Nothing in the record supports Ferrebee's contention that the County was dishonest in its use of the $275 appraisal for the basis of its offer. However, for the sake of clarity, a review of the record reflects that the County's $275 offer was based on an appraisal of a thoroughly qualified appraiser, whose appraisal have been criticized by another appraiser and then he had been given an opportunity to respond to that criticism and to justify his appraisal. R. 435, at 101-6, 205-6, 437, at 391, Exhibit 13.The

other County appraisals which ranged from $4,500 an acre to $1750 an acre could not be used for the basis for an offer to Ferrebee when the offer was made because they were out of date. It was during the County's preparations to make a final offers for the property that it was first discovered that property values in the area had dropped dramatically. R. 437, at 352-62. The county went through the review appraisal to properly certify that the $275 per acre offer was appropriate.

Nothing in the record would indicate that the county did not have an honest belief in the propriety of its actions, and Ferrebee has pointed to nothing which would indicate that the county intended to defraud or take unconscionable advantage of him.

The court's finding as to the good faith actions of the county are substantiated by the record, and the lower court did not abused its discretion in denying an award of attorneys fees.

E. FERREBEE IS NOT ENTITLED TO AN AWARD OF COSTS IN THE FORM OF HIS EXPERT WITNESS FEES

There is no statutory authority which would permit the lower court to award costs against the County in the form of Ferrebee's expert witness fees. Furthermore, Ferrebee has waiver his right to have the matter considered in this appeal because he failed to properly raise the issue before the lower court.

Section 78-34-1 et seq. which governs condemnation actions in Utah does not provided for an award of costs to the landowner

for his expenses in retaining an appraiser to provide an appraisal or testimony. Furthermore, the most recent statement of the Utah Courts on this subject indicates that they are not recoverable. Redevelopment Agency v. Daskalas, 785 P.2d 1112. 1124 (Utah App. 1989).

Finally, Ferrebee did not fully raise the question of the award of cost before the lower court. In a discussion at the time the lower courts entered his Bench Ruling, Ferrebee's counsel asked for an award of cost, including the his expenses in providing expert appraisals.

MR. SCHMUTZ: One final point, your Honor, with respect to cost. Should I submit a bill of costs? Certainly the primary costs are the $12- or $13,000 in appraisal fees. The Court has adopted the appraisal fee -- one of those appraisals. And I would be submitting a bill of costs and wonder if the Court could give me any direction whether those costs would be awarded.

THE COURT: Well, do you have any comment?

MR. THOMAS: There is no provision for the award of cost, your Honor.

THE COURT: I would state this to you: That you have the right to submit your cost bill. Right now, I would indicate to you that appraisal costs would not be a billable cost as far as what you would be entitled to under a cost bill.

MR. SCHMUTZ: Your Honor, if I may have leave, I would like to argue that this is an unusual case where the issue is value, and it isn't as though an expert is being called to determine standard of care. The ultimate issue that the Court finds, that it's adopted in the form of the Cook appraisal -- we were forced as a

> defendant to set forth the value for the land. And I think this is a case where, under the discretion of the Court, those costs can be awarded.
>
> THE COURT: Well, I am not cutting you off now. But I'll indicate to you that before you spent your time to argue it, you better have some law to give me as far as the costs are concerned.

R. 431, at 8-9. Ferrebee's counsel did not pursue the matter further and did not provided the Court with any authority which would permit the Court to award the costs that he sought.[14]

II.
CONCLUSION

The lower court committed reversible error in awarding an enhance value to Ferrebee based on the property's proximity to the Airport. In addition the lower court abused its discretion in accepting Ferrebee's appraiser's appraisal as the basis for valuation. The Court should reject the findings and conclusions of the lower court and remand the matter for the entry of findings which are consistent with the appraisals provided by the County.

Finally, the Court should reject Ferrebee's appeal on the issues of the lower court's use of the option evidence, attorneys' fees and costs and award the County its costs on appeal.

DATED this 21st day of January, 1992.

Stoker & Thomas

By 
David B. Thomas
Attorneys for Plaintiff

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[14] Daskalas was handed down well after the Court entered its Bench Ruling in this case in August 29, 1989.

CERTIFICATE OF MAILING

The undersigned hereby verifies that on the 21st day of January, 1992, a true and correct copy of the foregoing Reply Memorandum was mailed, postage prepaid, to the following:

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